

## Practical Guidance for **Employers** Reviewing/Assessing Applications for Religious Exemption from Vaccine Mandates

On December 2, 2022, NYC Department of Health and Mental Hygiene Commissioner Dave Chokshi issued a mandate (“Mandate”) requiring staff members at non-public schools to be vaccinated against COVID-19 by December 20, 2021.

### **THE EMPLOYER’S DUTY**

Non-public schools are **required** under Title VII of the Civil Rights Act of 1964 to provide *reasonable accommodations* to individuals who have sincerely held religious objections to workplace policies, including the Mandate.

A non-public school’s obligations under Title VII are triggered once an employee notifies it that there is a conflict between his or her sincerely held religious beliefs, practices, or observances and the Mandate. At that point, the school is required to offer a reasonable accommodation, unless it would cause an undue hardship. Since employees need not state any “magic words” such as “Title VII” or “religious accommodation” to make such a request, it is a best practice for non-public schools to implement a religious exemption request procedure and make its employees aware of it.

### **EVALUATING AN EXEMPTION REQUEST**

When evaluating employees’ religious exemption requests, non-public schools should keep in mind that the employee need only demonstrate that his or her belief is 1) religious in nature and 2) sincerely held. Furthermore, the EEOC’s recent guidance states that an employer should generally assume that any religious exemption request is based on sincerely held religious beliefs, and that an employer may only make a “limited factual inquiry and seek[] additional supporting information” if the employer “has an objective basis for questioning either the religious nature or the sincerity of a particular belief, . . .”<sup>1</sup> Keep the following points in mind when assessing these two elements of a sincerely held religious belief, as well as the nature of the reasonable accommodation.

#### **Religious in nature**

- The definition of religion is very broad and includes traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism. It also includes religious beliefs that are new, uncommon, not part of a formal church or sect, held by a small number of people, or unfamiliar to the employer.

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<sup>1</sup> All quotes are from the EEOC’s new guidance: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (last updated December 14, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.6>.

- Religious beliefs includes both theistic beliefs and non-theistic moral or ethical beliefs that occupy in the life of its possessor a place parallel to that filled by God in traditionally religious persons.
- One touchstone of a religion is present where a believer will categorically disregard elementary self-interest (such as being terminated from his or her job) rather than transgressing religious tenets.
- Religious beliefs do not include social, medical, cultural, political, economic, or solely personal beliefs.
- While a letter from a religious official certainly constitutes evidence that an individual's belief is religious in nature, it is not required to do so; it is unconstitutional to condition the eligibility for a religious exemption upon submission of a clergy letter.
- The employer may not question the validity or accuracy of the employee's beliefs.
- The employer may not decline a religious exemption request because the beliefs are nontraditional, unfamiliar to the employer, not part of an established or recognized religious organization, or not consistent with the individual's professed faith tradition's beliefs.

### **Sincerely held**

- According to the EEOC's guidance, the sincerity of sincerely held religious beliefs is not usually in dispute and is "largely a matter of individual credibility."
- The EEOC states you may consider whether the employee has acted in a manner inconsistent with the professed belief when assessing sincerity. Note, however, that the EEOC also states that "employees need not be scrupulous in their observance," and that "[a]lthough prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held."
- The EEOC states you may also consider whether the accommodation sought is a particularly desirable benefit likely sought for nonreligious reasons, whether the timing of the request renders it suspect (for example, it follows an earlier request by the employee for the same benefit for secular reasons), and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.
- While a letter from a religious official certainly provides evidence that an individual's belief is sincerely held, it is not required to do so; it is unconstitutional to condition the eligibility for a religious exemption upon submission of a clergy letter.

### **Accommodations**

- EEOC guidance states that an employer should "consider all possible alternatives to determine whether exempting an employee from a vaccination requirement would impose an undue hardship."
- As such, "an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment." Reasonable accommodations may also include periodic testing, masking, and social distancing requirements.
- While Title VII only requires reasonable accommodations, a private employer may decide to provide greater levels of accommodations at its own discretion; the law places no limitation on how far an employer *may* go in accommodating an employee.

## **Record Requirements**

Under the Mandate, certain record requirements apply.

Nonpublic schools must securely maintain a record of each employee's submission of vaccination status. The record may be maintained electronically or on paper and must be made available to the Department upon request. These records must include the following:

- (a) Each staff member's name and start date.
- (b) The type of proof of vaccination submitted; the date such proof was collected; and whether the person is fully vaccinated, as defined in this Order.
- (c) For any staff member who submits proof of the first dose of a two-dose vaccine, the date by which proof of the second dose must be provided, which must be no later than 45 days after the proof of first dose was submitted.
- (d) For any staff member who does not submit proof of COVID-19 vaccination because of a reasonable accommodation, the record must indicate that such accommodation was provided.

Nonpublic schools must also securely maintain a separate record of each employee who was granted a religious exemption. The record may be maintained electronically or on paper and must be made available to the Department upon request. It should include the staff member's name and start date, the basis for the staff member's accommodation, and any supporting documentation provided by such staff. It would also be prudent to include a religious exemption denial in the file of any employee who has requested and failed to obtain a religious exemption.

By December 28, 2021, nonpublic schools must electronically submit an initial affirmation of compliance with these records requirements in the form prescribed by the Department. By February 17, 2022, they must submit follow up affirmations in the form prescribed by the Department to demonstrate that all staff are fully vaccinated.

## **Sample Letters**

### **RELIGIOUS EXEMPTION GRANT LETTER**

Dear [EMPLOYEE]

We have reviewed your exemption request from the vaccination mandate dated [DATE]. We have determined that your belief is both religious in nature and sincerely held, and that accommodating your religious beliefs will not pose an undue hardship. Your religious exemption request is therefore granted, and your accommodation in lieu of vaccination is [ACCOMMODATION, e.g., weekly testing].

### **SAMPLE RELIGIOUS EXEMPTION DENIAL LETTER**

Dear [EMPLOYEE]

We have reviewed your exemption request from the vaccination mandate dated [DATE]. Your religious exemption request is denied because we have determined that [PICK ONE OR MORE OF THE FOLLOWING: 1) Your belief is not religious in nature 2) Your belief is not sincerely held 3) Accommodating your religious objection would pose an undue hardship because [explain the nature of the undue hardship using specific and objective (not speculative) facts that relate to that particular employee.